United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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P/S

74-1415

To be Argued by Frances Loren
74-1415

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NELLIE HILL, TONY CHOW, JAMES GARCIA, WALTER McNAIR, LINO ACEVEDO, BARBARA GADSDEN, each individually and on behalf of all others similarly situated,

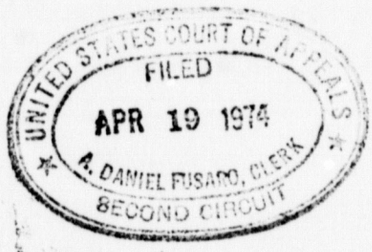
Plaintiffs-Appellants

vs.

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; JAMES R. DUMPSON, individually and in his capacity as Administrator of New York City Human Resources Administration; THE NEW YORK CITY YOUTH SERVICES AGENCY, CARLETON IRISH, individually and in his capacity as Acting Commissioner of the New York City Youth Services Agency, etc., et al.,

Defendants-Appellees

APPELLEE'S BRIEF



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THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION; JAMES R. DUMPSON, individually and in his capacity as Administrator of the New York City Human Resources Administration; THE NEW YORK CITY YOUTH SERVICES AGENCY, CARLETON IRISH, individually and in his capacity as Acting Commissioner of the New York City Youth Services Agency; THE NEW YORK CITY DEPARTMENT OF PERSONNEL: THE NEW YORK CITY CIVIL SERVICE COMMISSION; HARRY I. BRONSTEIN, individually and in his capacities as Director of the New York City Department of Personnel and Chairman of the New York City Civil Service Commission; and JAMES W. SMITH and JOSEPHINE GAMBINO, each individually and in his or her capacity as Civil Service Commissioner,

Defendants-Appellees

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APPELLEE'S BRIEF

Statement

This is an appeal from an order of the District Court for the Southern District of New York (Lasker, D.J.), entered on March 27, 1974, which denied plaintiffs' motion for a preliminary injunction. Plaintiffs sought to enjoin permanent

appointments from civil service eligible lists to three categories of positions in the New York City Youth Services Agency, a component agency of the Human Resources Administration, and to restrain defendants from replacing employees now serving provisionally with permanent employees appointed from those lists. This Court ordered a stay of appointments pending determination of this appeal on an expedited basis.

Questions Presented

This suit is modeled after several recent cases in which this Court has held that a test for public employment which has a disparate impact on minorities and which cannot be shown to be "job-related" is discriminatory and violates the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983. Vulcan Society v. Civil Service Comm'n, 490 F. 2d 387 (2d Cir., 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n., 482 F. 2d 1333 (2d Cir., 1973); Chance v. Board of Examiners, 458 F. 2d 1167 (2d Cir., 1972). Plaintiffs bear the burden of introducing evidence sufficient to establish a prima facie case of discrimination; this is done most often by introducing statistical data as to the ethnic identity of persons who took the exam and passed or failed it, or who will be appointed as a result of an exam. Only after plaintiffs have established their prima facie case by showing a "significant and substantial discriminatory impact" does the burden shift to the employer to show that a test is relevant to the require-

ments of the position for which it is given, i.e., "job-related." Chance v. Board of Examiners, 458 F. 2d 1157, 1175-1176 (2d Cir., 1972).

The District Court denied the motion for a preliminary injunction on the ground that plaintiffs failed to make the necessary threshold showing of racial impact, primarily as a result of the delay in bringing the lawsuit, that a large percentage of the people appointed were themselves members of minority groups, and that it was being asked to halt an important process of government.

The following questions are presented:

1. Did the District Court clearly abuse its discretion in finding that plaintiffs had failed to make a prima facie case of disparate racial impact?

2. Did the District Court abuse its discretion in denying the preliminary injunction?

Facts

Plaintiffs began this action on March 12, 1974 by service of a summons, complaint and an order to show cause restraining defendants from making permanent appointments to three positions in the Youth Services Agency and from terminating provisional employees presently serving in those positions. The complaint challenged three examinations administered by the New York City Civil Service Commission which resulted in the establishing of eligible lists used as the source for permanent appointments to the Youth Services Agency

(YSA) as discriminating against Blacks, Hispanics and Orientals ("minorities") in violation of the Fifth and Fourteenth Amendments and 42 U.S.C. §§ 1981, 1983.* The named plaintiffs are Blacks, Hispanics and an Oriental who took one or more of the three challenged examinations and either failed, or who passed but, it is alleged, have little chance of appointment because of their low scores.

The Youth Services Agency is a component agency of the New York City Human Resources Administration. It is responsible for administering programs geared to the youth of the City (ages 7-21) such as organized recreation, individual and group counseling, employment counseling, referrals to drug abuse and other health treatment programs, and high school equivalency training. In order to carry out its programs, YSA employees must establish contact with the young people the Agency serves. YSA programs are especially important during the summer months. YSA planned to appoint eligibles from the challenged lists in March in order to provide sufficient time for the new employees to be trained and to establish personal contact for the summer programs (92a-93a).** These appointments were stayed by order of this Court pending the outcome of this appeal.

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* The complaint also alleges that defendants, by administering these examinations, violated the "Emergency Employment Act of 1971", 42 U.S.C. §4871, with respect to YSA employees hired under that act. That claim is not at issue in this appeal.

** Numbers in parentheses refer to pages in the Appellants' Appendix.

The three examinations in question are for the positions of Assistant Youth Services Specialist (AYSS; exam no. 3004), Youth Services Specialist (YSS; exam no. 2181) and Assistant Supervisor of Youth Services (exam no. 2253). All three were given in January, 1973. The eligible lists for the three exams were established on October 3, 1973 (no. 3004), October 16, 1973 (no. 2181) and December 12, 1973 (no. 2253)(56a, par. 2); the results of the exams were known to the candidates at that time. All three were competitive examinations resulting in ranked eligible lists. Exam no. 3004 for Assistant Youth Services Specialist was a "training and experience" test in which candidates submitted experience papers giving a history of their schooling and past employment; they were then rated on their experience. The other two examinations were written tests.

In order to prepare their personnel for the summer programs, YSA made fifty-seven appointments from the eligible list to the position of Assistant Youth Services Specialist before this lawsuit was filed (58a, par. 6). Thirty-eight appointments to the position of Youth Services Specialist were scheduled for March 15, 1974. The day before, March 14, these appointments were stayed by a temporary restraining order. Of the thirty-eight persons scheduled for appointment as Youth Services Specialists, eleven gave up employment to accept positions with YSA, six were previously unemployed and nine are employed by the Agency in lesser paying titles (93a, par. 6, 7). Additional appointments to the position of Assistant

Youth Services Specialist were scheduled for March 29 (94a, par. 7). Interviews for the position of Assistant Supervisor of Youth Services had been scheduled for the week of March 25 (60a).

Chance v. Board of Examiners taught that it is the plaintiffs' burden to make out a prima facie case of racial discrimination based upon reliable statistical data showing discriminatory impact. 458 F. 2d 1167 (2d Cir., 1972). At the time plaintiffs began this lawsuit on March 12 they did not have sufficient data to satisfy this burden. The complaint was virtually barren of relevant statistics. It alleges merely that the percentage of whites who passed each exam was approximately four times as great as the percentage of minorities (16a, par. 27) and that defendants intended to appoint four times as many whites as minorities (16a, par. 28). Plaintiffs provided no data supporting either of these propositions.

On March 14 the District Judge issued a temporary restraining order halting appointments for ten days, during which time defendants were to respond in opposition to the motion for a preliminary injunction and in the process, furnish plaintiffs with the available information concerning the ethnic identity of the people who took the exam. Defendants do not routinely keep records of the ethnic identity of all persons taking all civil service exams. However, in preparing their response they collected ethnic data, to the best of their ability, for persons whose names appeared on the three challenged lists. Therefore, in addition to the information con-

tained in the Repetto affidavit of March 20 (56a), they provided plaintiffs with computer runs for the three challenged exams giving the names and scores of passers, and the names of failures, absentees and those not qualified, all marked to note ethnic identification wherever it was known.

Pursuant to the schedule set by the District Court, plaintiffs received this information and defendants' answering papers on March 20. Plaintiffs were permitted to respond by March 25 when they served the Cloward affidavit, which drew certain conclusions concerning the statistical data. Because of the need for a rapid determination, defendants were not given the opportunity to analyze or refute the conclusions in this affidavit. On March 27 the District Court denied the motion for a preliminary injunction.

YSA was able to provide ethnic identification for only some of the test-takers: current employees of YSA, those people on the lists who were already interviewed, and some former YSA employees. The available information is detailed in the Repetto affidavits of March 20 (56a) and April 1 (92a).

For the examination for Assistant Youth Services Specialist, the ethnic identity is known for only 9% of those who passed and 3% of those who failed. Based upon this very small sample, 94% of the white candidates passed, 89% of the blacks and 100% of the Hispanics (57a, par. 5).

For the exam for Youth Services Specialist, ethnic identification could be made for 44% of the passers and 16% of the failures (58a, par. 7). For the exam for Assistant Supervisor of Youth Services, 28% of the passers and 16% of the failures were known (59a, par. 9). Based upon the available data, blacks passed both of these exams at a considerably lower rate than whites.

Defendants also provided data identifying those people already appointed from the lists, those scheduled for appointment on March 15, and those people already interviewed. The facts show that the overwhelming majority of those appointed will be members of minority groups.

Fifty-seven people had already been appointed from the list for Assistant Youth Services Specialist when suit was begun. Forty-eight are minorities and nine are white. These names are from the first 150 of the eligible list (58a, par. 6). Numbers 151-300 have been called for interviews. Of those interviewed, 21 were white, 21 black, 6 Hispanic, 2 Oriental and 2 Middle-Eastern, a total of 52. Forty-eight have accepted employment (95a, par. 9). These appointments were stayed by this action.

For the position of Youth Services Specialist, the first 120 names on the eligible list were certified to YSA; sixty-four appeared for interviews. Of the first sixty-four persons scheduled for appointment, 43 are minorities and 21 are white (59a, par. 8). Subsequently, numbers 121-145 were called. Eight persons accepted employment, 3 black, 5 white (95a, par. 10).

Interviews for the position of Assistant Supervisor of Youth Services have not progressed to the point where similar data is available for that position (59a, par. 10).

Opinion Below

The District Court held that plaintiffs must base their request for injunctive relief on a threshhold showing of racial impact. Judge Lasker found that the available information upon which plaintiffs based their prima facie case was incomplete, was not determined on a random basis, and was of questionable dependability. Furthermore, he found that the primary reason for the lack of data was the considerable delay by plaintiffs in bringing this lawsuit and that no meaningful further statistics could be secured without an overall survey which would require substantial time. He concluded as follows:

> "We believe that [relief] should be denied because we conclude that the plaintiffs have not, in view of the undependability of the facts, established the probability of their success on the merits and that the primary cause for the unavailability of such information is their delay in bringing suit. We recognize that the denial of relief may, depending on the outcome of the case, impose substantial hardships on the plaintiffs but, in balance, we must consider, first, that we are asked to halt the ordinary process of government in an important sphere and, second, that a very large percentage of those who have been appointed to the permanent positions which plaintiffs seek to fill are themselves members of the minority groups."

ARGUMENT

POINT I

PLAINTIFFS FAILED TO MEET THEIR BURDEN OF MAKING A PRIMA FACIE SHOWING OF RACIALLY DISPROPORTIONATE IMPACT. THE DENIAL OF A PRELIMINARY INJUNCTION WAS NOT AN ABUSE OF DISCRETION.

The District Court found that plaintiffs had not made a sufficient threshold showing of racial impact to justify preliminary injunctive relief since the information available as to the racial makeup of those who passed and failed the tests "is sketchy and undependable". Moreover, the District Court also found that a large percentage of those persons permanently appointed as a result of the challenged examinations are members of minority groups. A clear abuse of discretion must be shown to an appellate court in order to obtain a reversal of the trial court's denial of a temporary injunction. Pride v. Community School Board of Brooklyn, 482 F. 2d 257, 264 (2d Cir., 1973); Checkers Motor Corp. v. Chrysler Corp., 405 F. 2d 319, 323 (2d Cir., 1969); Dino de Laurentiis Cinematografica, S.P.A. v. D-150, Inc., 366 F. 2d 373, 374-75 (2d Cir., 1966). As this Court stated in Chance v. Board of Examiners, 458 F. 2d 1167, 1169 (1972), "the ultimate issues before us are simple to state: Were [the District Judge's] findings of fact clearly erroneous, and did he commit any errors of law?"

In cases alleging unintentional discrimination in public employment, statistical evidence can establish that an examination had a racially disproportionate impact upon minorities. Vulcan Society v. Civil Service Comm'n., 490 F. 2d 387 (2d Cir., 1973); Carter v. Gallagher, 452 F. 2d 315, 323 (8th Cir., 1971), cert. denied, 406 U.S. 950 (1972). However, plaintiffs must prove that there has been a "significant and substantial discriminatory impact" upon minority applicants and must demonstrate by their statistics the existence of "a disparity of sufficient magnitude to amount to a prima facie case of invidious discrimination". Chance, supra, 458 F. 2d at 1175, 1176.

Exacting criteria have been established in this Circuit for developing statistical evidence sufficient to support a preliminary injunction. Statistical data of questionable probative force, due, for example, to samples too small to be reliable, have been rejected.

In a case similar to this one a preliminary injunction was denied to plaintiffs who were provisional employees and who were to be replaced by permanent employees. Gonzalez v. City of New York, 4 EPD ¶7867 (S.D.N.Y., 1972). The court held that "numbers comprise a critical element of what the case purports to be about" and that the numbers were "neither fully revealed nor decisive in their incomplete state at the moment." The court denied the preliminary injunction while leaving open the possibility that further discovery might lead to a later application for preliminary relief.

In Chance v. Board of Examiners the District Court, before it would order a preliminary injunction, directed the parties to compile a statistical survey to provide pass fail statistics. This survey studied fifty examinations given over a period of seven years. 330 F. Supp 203, 209 (S.D.N.Y. 1971). In reaching its decision the court relied primarily on six examinations, finding that meaningful conclusions could not be drawn from the other forty-three studied. Id. at 211-213. It did not rely on exams resulting in small samples, principally because of the risk of spurious differences based on insufficient evidence. Id. at 212.

The entry level and promotional examinations of the Bridgeport, Connecticut, police department were challenged in Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n., 482 F. 2d 1333 (2d Cir., 1973). The District Court looked at the results of six entry level examinations given between 1965 and 1970 before deciding that the written examinations had a discriminatory effect. The Court apparently had exact figures of the numbers of whites, blacks and Puerto Ricans who both took and passed the exams. 354 F. Supp. 778, 784 (D. Conn., 1973). However, when it came to the promotion exams the District Court held that the numbers on which the results were based were too small to have constitutional significance. Id. at 795. This court held that there was no abuse of discretion in the district court's refusal to find de facto discrimination with respect to the promotion exams. 482 F. 2d at 1339.

Other cases show similar thorough data-gathering prior to the issuance of an injunction. In Vulcan Society v. Civil Service Comm'n., 490 F. 2d 387 (2d Cir., 1973) a sight survey was made of almost 14,000 applicants for an entry level fireman's examination, and another of the top 8,000 men on the eligible list who appeared for a physical exam. The District Court's detailed description of how the figures were obtained lends no support to plaintiffs' allegations that their evidence measures up to the statistical evidence relied upon in the Vulcan's case. 360 F. Supp. 1265, 1268-1270 (S.D.N.Y., 1973). A preliminary injunction was denied in Guardians Assn. of the N.Y.C. P. Dept. v. Civil Service Comm'n., 490 F. 2d 400 (2d Cir., 1973), notwithstanding a strong showing of disparate impact, confirmed by an independent survey. In Kirkland v. N.Y.S. Dept. of Correctional Services, also decided by Judge Lasker, defendants neither denied the accuracy of plaintiffs' figures nor denied the statistical significance of the differential impact indicated by them. Index No. 73 Civ. 1548 (S.D.N.Y., Apr. 1, 1974) at 7, Lasker, D.J.

A Massachusetts examination for fireman was challenged in Boston Chapter, NAACP v. Beecher, 7 EPD ¶9162 (D. Mass., 1974). The applicants were asked to identify their race, color or national origin; 84% responded. The court held the resulting data insufficient to establish a prima facie case, said it was unimpressed "by such obviously meager statistics" and used population statistics to buttress the exam statistics. Id at p. 6857-6858. Plaintiffs do not rely on population statistics in this case, perhaps because of the large number of minorities presently employed by the Agency (60a, par. 11).

(a)

Validity of the cutoff point set by plaintiffs for High Pass-Low Pass

Plaintiffs allege that the three challenged examinations will result in the appointment of only those at the top of those lists, that minorities scored lower than whites on the tests, and that the tests therefore have a differential impact in terms of who will be hired. They have therefore analyzed the data by dividing it into categories of "high pass," "low pass" and "fail," concluding that the two higher level exams have a racially disproportionate impact because whites received scores in the "high pass" range with proportionally greater frequency than minorities.

Civil service eligible lists may be used for a period of four years. N.Y.S. Civil Service Law, §56. Plaintiffs' theory is modeled after the Vulcan case, in which it was virtually conceded that the list would not be exhausted during its four-year life. That list had 12,000 names on it and the court found the prospect remote that appointments would be made beyond the first 8,000 names on the list. Vulcan Society v. Civil Service Comm'n., 360 F. Supp. 1265, 1271 (S.D.N.Y., 1973), aff'd 490 F. 2d 387 (2d Cir., 1973). This is not the Vulcan case. Each of the two lists analyzed has only some two hundred names on it, not 12,000.

So far as defendants can ascertain, plaintiffs have no basis for the particular cutoff points picked in the Cloward affidavit. YSA is an agency with rapid turnover. Defendants do not know how far down on each list they will have to go to make sufficient appointments (60a, par. 1) Although 149 provisionals will be replaced, this does not reflect the total number of appointments which will be made. Appointments of people from lower to higher titles create vacancies to be filled in the lower titles; because of the interrelationship of the lists it is impossible to predict how many appointments will be made (60a, par. 11).

Defendants have introduced evidence as to the numbers of people already appointed and scheduled to be appointed and their rank on the eligible list. This shows not only the number of appointments made so far, but also the tremendous attrition rate from the lists, which is consistent with general civil service experience; both lead to the conclusion that the "high pass" points are not sustainable.

For the position of Assistant Youth Services Specialist, 57 appointments resulted from the first 150 names on the eligible list (58a,par. 6). Numbers 151 through 300 were called for interviews; 52 were interviewed and 48 accepted employment (95a, par. 9). For this position, 300 names were reached, resulting in a projected 105 appointments. This illustrates that in selecting cut-off scores, plaintiffs failed to take into consideration any dropout rate among candidates for appointment.

Similarly, plaintiffs established the high pass point for Youth Services Specialist at 150. Numbers 1 through 145 have already been called; on this list there appears to be an attrition rate of half the number of names on the list (59a, par. 8; 95, par. 10).

YSA has received certification from the Department of Personnel of the first 68 names on the list for Assistant Supervisor of Youth Services (59a, par. 10), farther down on the list than the high pass point in the Cloward affidavit (69a).

(b)

The probative value of the examination statistics

Plaintiffs place great reliance on the conclusions found in the affidavit of their statistical expert, Richard Cloward; and they comment repeatedly that defendants have not submitted their own expert analysis of the data. As a practical matter the burden fell to defendants to provide sufficient data to enable plaintiffs to make their prima facie case. They were put to answering in specific detail a general allegation that whites passed each exam at a rate four times that of minorities and that defendants intended to appoint four times as many whites as minorities (16a, pars. 27, 28). Plaintiffs were then in a position to respond to defendants' data. The District Court set up a schedule which originally allowed defendants five days to collect the relevant data in response to plaintiffs' motion, or until March 19. Defendants served their papers on March 20.

The plaintiffs were given until March 25 to respond to the data provided by defendants. The second series of appointments was scheduled for March 29 (94a, par. 7). In view of the time limitations defendants had no opportunity to present any rebuttal to or expert evaluation of plaintiffs' use of the data. The preliminary injunction was denied on March 27.

The information provided is based on ethnic identification of those currently employed by YSA, those on the list who have already been interviewed and some former employees of YSA (57a, par. 3). The Cloward affidavit states that these "are entirely non-random sources of information" which do not provide a random sample and that a random sample could result in different ethnic percentages for at least one of the exams. Since only 9% of the passers of exam. no. 3004 (Assistant Youth Services Specialist) are known, he could not draw reliable conclusions from the data on that exam. The district court found that the sample was too small to be reliable. More to the point, the district court found that, even if reliable, the figures do not establish a prima facie showing of racial impact" (72a-73a).

A higher percentage of candidates for the other exams can be identified. For exam no. 2181 for Youth Services Specialist, forty-four percent of the total number of passers are known and sixteen percent of the failures. For exam no. 2253 for Assistant Supervisor of Youth Services, twenty-eight percent of the number of passers are known and sixteen percent of the failures. Although it was based on the same non-random data as the AYSS exam, Cloward did analyze this data. He arbitrarily picked a"high pass" point for possible appointments, divided the candidates into "high pass", "low pass" and failed , and concluded that whites received grades of "high pass" at a sufficiently greater rate to lead him to conclude that the examination procedures are racially biased (68a).

Even without the help of an expert, it is apparent that Professor Cloward's affidavit raises serious questions as to the significance of the tables on page 69a of the Appendix and the inferences which can be drawn from them.

For exam no. 2181 the sample of known high passers is strikingly greater than the sample of known low passers. The chart (69a) indicates that the high pass category is number 1-150, the low pass, 151-215. Only 16 people are listed in the low pass category. Low pass figures are based on knowing 16 people out of 65, high pass on knowing 76 out of 150. On the basis of Cloward's numbers, those identified

as low passers comprise only 9% of all candidates for that exam who have been identified.

For exam no. 2253, twenty-eight percent of those who passed can be identified, a smaller percentage than for exam no. 2181. Again, proportionally more of those who can be identified fall into the high pass category. Twenty-one out of 50 in the high pass category are known, or 42%; 49 out of 216 in the low pass category are known, or 23%.

The samples are so small for 2253 that if one more Hispanic were added in the high pass category there would be a change of 6% in their high pass rate. In fact, defendants counted three identified Hispanics in the high pass category on the computer printout of the exam (a copy was provided to plaintiffs), not two as in the Cloward statistics. Because of the small sample this brings the percentage of Hispanic high passers to 19% from 13%. See Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, 354 F. Supp. 778, 795 (D. Conn., 1973).

Although defendants did not have an opportunity to obtain expert comment on the significance of the questions raised here to lay people, or of the failure of the Cloward affidavit to deal with the significance of the differing samples, defendants believe that these statistical discrepancies strongly support the District Court's finding that the statistics are unreliable. The data does not establish a prima facie case in accordance with the standards found in

the other cases in this Circuit discussed above. The District Court did not abuse its discretion when it found the data unreliable and refused to issue a preliminary injunction.

This conclusion is reinforced by the holding in Commonwealth of Pennsylvania v. O'Neill, 473 F. 2d 1029 (1973), in which the Third Circuit Court of Appeals reversed a preliminary injunction issued against the use of police promotion exams. The district court had relied upon plaintiffs' unrebutted statistics showing differential passing rates for three exams; it went on to state that there was no evidence as to the statistical significance of these figures. The Circuit Court vacated the injunction solely because of the absence of evidence as to statistical significance of the data.

(c)

Defendants have provided reliable evidence rebutting any inference of adverse racial impact.

In contrast to the uncertainties posed by the statistical data concerning pass rates, there is reliable information available as to the ethnic identity of persons whose high scores put them at the top of the lists and who were appointed or interviewed for appointment. The District Court used this information furnished by defendants as a basis for denial of the preliminary injunction.

Of 57 people appointed as Assistant Youth Services Specialists, 48 (84%) were members of minority groups (58a). Fifty-two additional persons have been interviewed from that list, of whom only 21 were white; forty-eight have accepted employment (95a). Sixty-four persons are scheduled for appointment from the list for Youth Services Specialists; forty-three are minorities (59a, par. 8).

It is clear from these figures that minorities are at the top of the three challenged lists and are receiving a substantial number of opportunities for permanent civil service appointments from at least two of these lists. No interviews for appointments have been held yet for the third list, Assistant Supervisor of Youth Services (60a, par. 10). The appointments and prospective appointments directly contradict the inconsistent allegations in plaintiffs' papers that defendants intend to appoint four times as many whites as minorities (16a, par. 28), or that two-thirds of the persons appointed will be

white (51a, par. 10). At this stage in the proceedings, defendants have unquestionably shown that denial of the preliminary injunction will not result in the underrepresentation of minorities in these YSA positions, nor will it deny equal employment opportunities to minorities. The district court was faced with a practical situation in which minority group members would receive permanent civil service appointments if the preliminary injunction was denied. Under such circumstances the denial of the injunction was not an abuse of discretion. Guardians Ass'n. of the N.Y.C.P. Dept. v. Civil Service Comm'n., 490 F. 2d 400 (2d Cir., 1973).

POINT II

THE DENIAL OF THE PRELIMINARY INJUNCTION WAS NOT AN ABUSE OF DISCRETION. THE PLAINTIFFS DID NOT ESTABLISH THAT IRREPARABLE INJURY WILL RESULT UNLESS THE INJUNCTION IS GRANTED OR THAT, ON A BALANCING OF EQUITIES, SUCH INJURY TO THE PLAINTIFFS IS GREATER THAN THE INJURY TO OTHERS INCLUDING THE PUBLIC WHICH WILL RESULT FROM THE GRANTING OF THE INJUNCTION.

(1)

Preliminary injunctive relief is an extraordinary remedy and plaintiffs in this action must satisfy a heavy burden to obtain such relief. The moving party "assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that it has raised serious questions going to the merits and that the balance of hardships tips sharply in its favor." Pride v. Community School Board of Brooklyn, 482 F. 2d 257, 264 (2d Cir., 1973); Stark v. New York Stock Exchange, 466 F. 2d 743 (2d Cir., 1972); Checker Motors Corp. v. Chrysler Corp., 405 F. 2d 319, 323 (2d Cir., 1969), cert. denied, 394 U.S. 999 (1969).

In Pride this Court noted that this standard is applicable even in a civil rights case once a prima facie showing of discriminatory effect has been made. The Court stated (482 F. 2d at 264, n. 9):

> "It is true that, where the appropriate showing is made at a trial on the merits, the burden will shift to the defendant. Chance v. Board of Examiners, 458 F. 2d 1167, 1176 (2 Cir. 1972). While that rule may be relevant in evaluating a plaintiff's likelihood of success at trial, it does not change the basic equation by which a motion for preliminary injunction is assessed. We therefore see no reason to apply any different standard in a civil rights or other constitutional action than in any other case at this procedural stage. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 453 F. 2d 12, 20 (2 Cir. 1971)."

The District Court denied the preliminary injunction based upon a proper consideration of the applicable standard. Its determination was based not only on the weakness of the statistical case relied upon by plaintiffs, but also upon the need for the normal processes of government to continue, the large percentage of minorities who will be appointed permanently, and the fact that the inadequate statistics were due primarily to delay by the plaintiffs in bringing suit.

Plaintiffs' case basically is that their statistics should be accepted. We have disposed of their argument above. Furthermore, even if their statistics were correct that would not mandate the grant of a preliminary injunction. In Guardians Association the statistics were unassailable, but the court, weighing the interests of the public and of the persons who would be appointed, as well as those of the plaintiffs, denied a preliminary injunction. 490 F. 2d 400 (2d Cir., 1973).

Plaintiffs rely heavily on the equitable argument that some provisional employees will lose their jobs if appointments continue. The harm to these individuals must be weighed against the interests of persons promised appointment just before this lawsuit was begun, who gave up jobs for the appointments or were previously unemployed and whose appointments were halted by this action (93a, par. 5-8).

Moreover, there is precedent for refusing to restrain appointments which will result in the replacement of provisional employees. In Gonzalez v. City of New York provisional employees challenged a civil service examination on the same grounds as plaintiffs here; they too, were to be replaced by permanent employees. 4 EPD ¶7867 (S.D.N.Y., 1972). The District Court denied a preliminary injunction, holding that plaintiffs had failed to provide factual support for their claim, and their "failure in this regard leaves no ground for allowing them to continue by court order to keep their provisional posts and thus exclude people who meet all the qualifications for permanent appointment."

Should they prevail in this lawsuit, plaintiffs are entitled to a new examination, which they may pass or not. Vulcan Society v. Civil Service Comm'n., 360 F. Supp. 1265, 1277-1278 (S.D.N.Y., 1973), aff'd 490 F. 2d 387 (2d Cir., 1973). So far as defendants know, no court in this type of case has ordered public employers to hire employees who have not passed some type of test. Bridgeport Guardians v. Members of Bridge-

port Civil Service Comm'n., 354 F. Supp. 778, 797 (D. Conn., 1973)aff'd 482 F. 2d 1333 (2d Cir., 1973); Pennsylvania v. O'Neill, 348 F. Supp. 1084, 1106-1107 (E.D. Pa., 1972).

The City of New York will be harmed if a preliminary injunction is granted. Further delay in making these appointments will seriously damage YSA's implementation of its summer programs for youth. The summer programs are particularly important because they serve young people who would otherwise be unemployed and idle but for the Agency's activities (92a-93a). There must be sufficient time to train new employees and to permit them to become acquainted with the young people with whom they'll be working. The temporary restraining order has already impaired the Agency's work and interfered with YSA's projected timetable; the Agency intended to complete its appointments in March (93a, par. 3).

Finally, "responsibility for the scarcity of information does not rest with defendants. The primary reason for the lack of data is the considerable delay in bringing this suit" (74a). This suit was filed on March 12, 1974. The results of these examinations were available in October (AYSS, YSS) and December, 1973 (Assistant Supervisor) (56a). The implication in plaintiffs' argument that the bulk of provisionals did not know they would be replaced strains credulity. Had suit been instituted promptly, necessary discovery could have been underway before the need for appointments became so pressing.

CONCLUSION

The order denying a preliminary injunction should be affirmed.

Dated: New York, N.Y.
April 19, 1974

Respectfully submitted,

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STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JAMES J. BOLAND

being duly sworn, says that on the 19 day of April 1974
at No. 351 Bway in the Borough of Manh in New York City, he served a copy
of the annexed appellants Brief upon Orrick Levy & Slate Esq.,
the Attorney for ~~the~~ Eugene Cummiss & Lewis Slate in the within entitled action, by delivering
a copy of the same to a person in charge of said Attorney's office, and leaving the same with him.

Sworn to before me, this 19
day of april 1974

James J. Boland

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
Commission Expires March 30, 1976

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